



## State of Oregon Department of Environmental Quality

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 10

OFFICE OF WATER AND WATERSHEDS



# Memorandum of Understanding

## Between the Oregon Department of Environmental Quality and the U.S. Environmental Protection Agency Region 10, Regarding Water Quality Standards Variances

### 1. Purpose

The purpose of this Memorandum of Understanding (MOU) is to establish a cooperative effort between the Oregon Department of Environmental Quality, Water Quality Division (DEQ) and the U.S. Environmental Protection, Region 10, Office of Water and Watersheds (EPA), (the Parties) for processing water quality standards (WQS) variance applications. Through the understandings established by this MOU, DEQ and EPA agree to work together in all stages of the variance process to facilitate efficient review and processing of variance applications.

### 2. Background

DEQ and EPA believe that guidelines developed in this MOU will assist in effective processing of WQS variance applications. Both agencies have spent considerable time working together on Oregon's revisions to the State's human health criteria. DEQ has worked extensively to ensure that these criteria are based on the best available science and are protective of all populations in the State that consume fish from the waters in Oregon. As a result of the increased stringency in the human health criteria, DEQ has worked with EPA to develop implementation provisions, including a detailed revision of DEQ's variance rule.

The federal water quality standards regulations at 40 CFR 131.13 provide that States may include general policies in their State water quality standards affecting their application and implementation, including variances. Such policies are required to be submitted to EPA for review and approval.<sup>1</sup>

Several EPA regions approve variances on a regular basis and do so with little or no delay to the state's processes. As NPDES permits continue to be written to attain more stringent criteria, DEQ and EPA have seen, and expect to continue to see, an increased need for variances. DEQ and EPA remain committed to work closely together to develop a more fluid and efficient process in Oregon.

### 3. Authority

Each party to this MOU is authorized to enter into this MOU pursuant to the following authorities:

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<sup>1</sup> In 1983, EPA amended the Water Quality Standards Regulation to explicitly address certain requirements in State standards and other legal and programmatic issues (48 FR 51400, November 8, 1983). The WQS Handbook at 5-12 further explains the 1983 Preamble in stating that EPA has approved State and Tribal use of variances when the individual variance is included in State or Tribal water quality standards. Each variance is subject to the same public review as other changes in water quality standards.

DEQ: ORS 468.035(1)(c) authorizes DEQ to cooperate with other agencies, including the federal government, with respect to matters pertaining to the control of water pollution.

EPA: Delegation 1-11 (authority to sign agreements with, inter alia, state, local and tribal governments).

#### 4. Roles and Responsibilities

Oregon's variance procedures and individual variances, as part of state water quality standards, must be consistent with the substantive requirements of section 303(c) of the Clean Water Act, 33 USCA 1251 et seq. and 40 C.F.R 131.

Oregon's variance regulation at OAR 340-041-0059 provides that individual variances must meet the following requirements (among others):

- Oregon must submit all proposed variances to EPA for approval.
- Public notice, opportunity for comment, and public hearing are all provided by Oregon.
- Existing State water quality criteria remain in effect for implementation in National Pollutant Discharge Elimination System (NPDES) permits, as appropriate, for those sources and pollutants not included in the variance.
- Variance duration is not to exceed the term of the NPDES permit.
- Oregon gives priority to NPDES permit renewals for permits containing variances.

EPA's review of individual variances adopted by DEQ, consistent with the requirements of the CWA, will include the justification for the following items:<sup>2</sup>

- Meeting the standard (for which the variance applies) is unattainable based on one or more of the 40 CFR 131.10(g) factors.
- Treatment more advanced than required by CWA sections 303(c)(2)(A) and (B) has been carefully considered, and alternative effluent control strategies have been evaluated.
- Justification for the term of the variance.
- The variance is as close to the underlying numeric criteria as is achievable.
- Reasonable progress will be made toward meeting the WQS during the term of the variance. For variance renewals, verify that terms and conditions of previous variance have been met.
- Variances may be renewed only when the discharger makes a renewed demonstration of "unattainability."

To ensure that variance applications are reviewed and processed in a timely and efficient manner, DEQ and EPA agree to the following:

A. Upon receipt of a complete variance application in accordance with OAR 340-041-0059, DEQ intends to provide a copy of the request to EPA. If DEQ is aware of an upcoming application, both agencies expect to communicate and share information regarding the upcoming request in advance. Upon receipt of a copy of any such variance application, EPA intends to conduct a preliminary review of the application and identify any potential issues of concern. For variances regarding aquatic life criteria, EPA intends to give DEQ a preliminary assessment of actions that may be necessary to comply with the Endangered Species Act (ESA), 16 USCA 1531 et seq.

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<sup>2</sup> USEPA 1994. *Water Quality Standards Handbook: Second Edition*. EPA 823-B-94-005a; and USEPA 1998. *Water Quality Standards Regulation: Proposed Rule*. Federal Register. July 6, 1998. Volume 63: 36742- 36805.

B. If DEQ determines that the variance request should be granted, DEQ intends to submit a draft proposed variance, along with a justification of how the proposed variance meets the requirements of OAR 340-041-0059, to EPA before DEQ provides public notice of the variance according to Oregon's public comment procedures. Where feasible, DEQ intends to put the proposed variance out for public comment at the same time as the draft permit.

C. EPA expects to review and provide comments on the draft variance and variance justification within 30 days of the date DEQ sends the draft proposed variance to EPA. During this preliminary review, EPA will evaluate the draft proposed variance and justification for consistency with 40 C.F.R. 131 and OAR 340-041-0059.

D. After considering any comments made by EPA regarding the draft proposed variance, DEQ will initiate public review and comment as required by OAR 340-045-0027.

E. During the public comment period, EPA may provide written comments and those comments may include any potential issues with the draft variance.

F. After the public comment period ends, DEQ will consider all comments and prepare a written response as soon as practicable.

G. Following granting of the variance, DEQ must submit the variance to EPA in compliance with the requirements for water quality standards submissions at 40 C.F.R. 131, including appropriate supporting justification and certification by the State Attorney General that the variance has been adopted in compliance with State law.

H. For variances involving aquatic life criteria, EPA intends to complete any actions necessary to comply with the requirements of the ESA as soon as practicable.

I. If EPA determines that DEQ's supporting justification and submittal demonstrate that the granting of the variance meets the requirements of section 303(c) of the CWA and 40 C.F.R. section 131, EPA intends to approve the variance in accordance with section 303(c) of the Clean Water Act, subject to the completion of any requirements for compliance with the ESA. Consistent with 40 C.F.R. 131.21(a)(1), EPA intends to provide notification that the variance submittal is approved within 60 days of its submittal or as soon as practicable after completion of any requirement for ESA compliance.

J. If EPA determines that DEQ's supporting justification and submittal do not demonstrate that the granting of a variance would be consistent with the requirements of 40 C.F.R. Part 131 and CWA Section 303(c), it may disapprove the variance in accordance with Section 303(c) of the Clean Water Act. Consistent with 40 C.F.R. 131.21(a)(2), EPA has 90 days to notify DEQ that the variance submittal is disapproved but intends to provide notice of any such disapproval as soon as practicable. A disapproved variance may not be used in an NPDES permit and, if it is included, EPA may object to the issuance of the NPDES permit.

## **5. Limitations**

A. No statements made in the course of negotiations among the Parties or in this MOU may be construed to represent an admission, determination, settlement, or adjudication of any legal or factual dispute relating to any Party's rights, privileges or interests.

B. This MOU shall not be construed as waiving any rights, powers, or remedies the parties have under any applicable Act of Congress, Executive Order, treaty, regulation, State Constitution, State law, court decision, equity, or other authority.

C. Nothing in this MOU shall change the jurisdictional authorities of the United States or any of its agencies, the Tribes or any of its agencies, the State or any of its agencies, or any other entity. This MOU is solely for the purpose of facilitating intergovernmental cooperation between the parties. This MOU is not and shall not be used as a precedent for resolution of any dispute regarding the jurisdictional authority of the parties to the agreement. This MOU creates no rights in third parties or the right of judicial review.

D. All agreements made in this MOU are subject to the availability of appropriated funds and each Party's budget priorities. Nothing in this MOU, in and of itself, obligates any Party to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. The parties agree not to submit a claim for compensation for services rendered to any of the other parties for activities they undertake in carrying out this MOU.

E. This MOU is neither a fiscal nor a funds obligation document. This MOU does not exempt the Parties from policies requiring competition for financial assistance and contracts. Any endeavor involving reimbursement or contribution of funds between the Parties will be handled in accordance with applicable laws, regulations, policies, and procedures, and will be subject to separate agreements that will be effected in writing.

F. This MOU does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are not party to this agreement, against the Parties to the MOU, their officers or employees, or any other person. This MOU does not direct the actions of, or apply to, any person outside the Parties to this MOU.

## **6. Commencement, Modification and Termination**

This MOU is to take effect when signed by both DEQ and EPA and shall be in effect until terminated by either one or both of the parties. This MOU may be amended or modified at any time by the mutual written consent of the Parties. A Party's participation in the MOU may be terminated at any time upon written notification to the other Party at least 90 days in advance of the termination date. This MOU may otherwise be terminated by written agreement of the Parties.

## **7. Points of Contact**

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## 8. Approval/Signatures

Oregon Department of Environmental Quality, Water Quality Division

  
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Gregory K. Aldrich, Interim Administrator

1-30-2012  
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Date

U.S. Environmental Protection Agency, Region 10, Office of Water and Watersheds

  
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Michael A. Bussell, Director

1-23-12  
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Date